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Oral Statement

Faye Ackermans
General Manager
Safety & regulatory Affairs
Canadian Pacific Railway

Docket Number FRA 2001-11068
Proposed Application of Random Testing and Other Requirements
To Employees of a Foreign Railroad Who are Based Outside the
United States and Perform Train or Dispatching Service in the
United States

Since 1992, I have been responsible at Canadian Pacific Railway (CPR) for regulatory oversight of the rules and regulations affecting safe train operations in both Canada and the United States. Until the acquisition of the Illinois Central by Canadian National, CPR was the only Class I North American Railway with substantial operations in both of our countries. Twenty to twenty-five percent of staff and track are U.S. based. This has given us a somewhat unique perspective of rail operating regulations promulgated both by the Federal Railroad Administration (FRA) and Transport Canada (TC). We have worked within both systems for more than a decade. My staff in the U.S. are responsible, among other things, for accident reporting to FRA and ensuring drug and alcohol testing conforms to 49 CFR Part 219 requirements.

The U.S. and Canada have largely equivalent systems in terms of the safety of operations afforded rail employees and the communities through which we operate. But, the legal and social systems in our two countries are different; they place different constraints on rail legislation and regulations; and they place different requirements on the railways and the regulators. The laws and regulations governing rail safety are not, and can never be, identical.

But, these minor differences should not be used to create impediments to trade in the rail industry.

Today in this hearing, I intend to advance several arguments in opposition to FRA's Notice of Proposed Rulemaking to remove current exemptions for Foreign Railroads Foreign Based (FRFB) employees contained within 49 CFR Part 219. These arguments are more fully outlined in our written submission, and I will only hit the highlights. These arguments include:

- There are no compelling safety reasons that warrant this change at this time
-The requirement to randomly drug test Canadians in Canada is hugely problematic from a human rights perspective.
- Other legislation including that governing rail accident investigation and Provincial Coroner's powers limit the expansion of part 219 post-accident testing and testing for cause for events that occur outside of the United States.
- Any comparison to the trucking industry used by FRA is inappropriate.
- Arguably, comparing the Rail mode to Aeronautics is more appropriate than trucking.
- This issue is more properly handled between governments, either bi-laterally or through NAFTA, rather than between the Regulator and the Railways.
- FRA has vastly underestimated the costs of the proposal

There are no compelling safety reasons that warrant this change at this time

FRA has been down this regulatory road before. In 1992, an ANPRM requested comments on issues arising from requirements to test foreign railroads operating within the United States. In

1994, FRA withdrew the ANPRM, explaining: "Foreign railroads generally enter into the United States territory only for limited distances and these railways already comply with existing FRA rules on post-accident and for cause testing. In light of this, and FRA's successful compliance record with foreign railroads, FRA will not proceed with a separate rulemaking on international application of the Act". The factors present in 1994, which permitted the safe withdrawal of the NPRM, namely, limited distance, limited operations, limited risk and a good compliance record, exist today. Let me explain.

Distances operated are limited. Attached to this statement is a CPR system map indicating the locations where traffic is interchanged, including the number of trains at each border crossing and numbers of crews and spareboard (or extraboard) employees involved.

There are 7 locations where Canadian crews operate into the United States. From west to east, these are:

Border to Eastport, Idaho – 1.7 miles

Border to Sweet Grass, Montana – 2.0 miles

Border to Portal, North Dakota – 2.8 miles

Border to Noyes, Minnesota – 3.2 miles

Border to Detroit, Michigan – 9.0 miles

Border to Buffalo, New York – 7.5 miles

Border to Rouses Point, New York – 1.2 miles.

These 7 locations total 27.4 miles.

The operations are limited. CPR operates an average of 27 trains each day southbound into the United States using Canadian crews. Annually, this amounts to about 57,000 total miles. If these 57,000 miles in the U.S. constituted a stand-alone railway, it would rank 354th by size.

Risk is limited. Using data supplied by FRA in the Regulatory Impact Analysis, and the miles we operate, we estimate that the accidents per million train miles with a primary or secondary cause code of impairment due to drugs or alcohol at less than 0.004 for the 14 year period from 1985 to 1998 inclusive. Adding the theoretical fatalities and injuries resulting from train accidents, we estimate the following yearly rates: 0.0014 accidents, 0.000007 fatalities and 0.0009 injuries. Total equipment and infrastructure damage costs each year would average $315.00 and total costs including items such as re-railing damage, lading damage and personal injury costs would average $635.00 each year.

In summary, the risks are extremely low, the number of train miles operated is small, the distances we operate are limited, and we are not aware of any compliance problems with the current 49 CFR Part 219 requirements when Canadian crews are in the U.S.

The requirement to randomly drug test Canadians in Canada is hugely problematic from a human rights perspective.

Decisions of Courts of Appeal, Human Rights Tribunals and labour arbitrations have found there must be a balancing of safety concerns and privacy concerns. Some drug testing may be

appropriate for employees in safety sensitive positions if such testing is for reasonable and probable cause, post accident, pre-employment, promotion or return to service. To-date, random drug testing has been found to be discriminatory and improper, even for safety sensitive positions. The rationale underlying this decision is that random drug testing does not test for current impairment, but only indicates that at some time in the past the individual used drugs.

Other legislation including that governing rail accident investigation and Provincial Coroner's powers limit the expansion of part 219 post-accident testing and testing for cause for events that occur outside of the United States.

The *Canadian Transportation Accident Investigation and Safety Board Act* contains powers such as the ability to seize, preserve and test evidence, exclude persons from accident sites and require persons to submit to medical examinations. Depending upon how these powers are exercised, the Canadian railways may or may not be able to meet FRA post-accident testing or for cause testing for accidents outside of the United States. We are not aware of any jurisprudence in this area.

Also, constitutional division of powers between the Federal and Provincial governments may play a role in post accident and for cause testing in Canada. Provincial coroners have the power to take charge in accidents where a fatality is involved, including seizing dead bodies. The railways may not be able to take samples for drug testing in those situations, and we would have no control over the laboratories used by the coroners to test samples.

These examples highlight the legal difficulties in unilaterally extending 49 CFR 219 to Canadian rail employees.

Any comparison to the trucking industry used by FRA is inappropriate.

The U.S. Federal Motor Carrier Safety Administration (FMCSA) applied all of 49 CFR part 382 to persons and employers of such persons who operate a commercial motor vehicle in the United States. However, there is a marked difference between the exposure associated with foreign-based employees engaged in truck operations and the foreign-based rail employees.

Rail employees travel on fixed routes for limited distances with relatively few trains. In 1997, 30,000 trains crossed the border from Canada to the US, including trains operated by U.S. crews returning to the U.S. Contrast this with 5.7 million truck crossings the same year. Trucks can access the U.S. from Canada at approximately 70 border crossings, and once in the U.S., can travel over 3 million miles of highway.

It is our understanding that Canadian truckers are currently complying with U.S. drug and alcohol regulations. This is largely a non-unionized environment. Despite that, there have been many complaints to the Canadian Human Rights Commission (CHRC). The CHRC is currently examining the issue, and we understand they will be issuing a policy ruling in 2002.

Arguably, comparing the Rail mode to Aeronautics is more appropriate than trucking

In contrast to trucks, the Federal Aviation Administration (FAA) has relied on international conventions. In withdrawing their 1992 ANPRM, one of the reasons FAA gave was that "Several commentators noted that the laws of the jurisdiction in which their employees are hired could prohibit employers from complying with mandatory testing regulations imposed by the United States." Further, FAA decided that rule making was not the best way to ensure safety, given the significant practical and legal concerns. In making this decision, FAA was, in part, relying on their own programs to assess whether foreign air carriers are held to international standards by their country of registry.

If FAA can have programs to monitor how well other countries ensure compliance, why can't FRA have a similar relationship with Transport Canada?

CPR submits that the rail situation more closely resembles aeronautics than it does trucking.

This issue is more properly handled between governments, either bi-laterally or through NAFTA, rather than between the Regulator and the Railways

CHRC legislation will not allow random testing of rail employees. Employees' refusal to test would impact cross border trade. One potential 'operating' solution would be to exchange all trains in Canada, rather than for U.S. and Canadian rail employees to share this work as they do

today. It is not feasible to exchange all traffic on the Canadian side of the border due to existing capacity and infrastructure constraints. Such a restriction could be viewed as a barrier to trade contrary to international obligations of the United States. Moreover, a recent ruling on Mexican truck safety makes it clear that even for safety reasons, it is inconsistent with NAFTA to absolutely require, as a precondition of entry, that the regulatory systems in the two countries be substantially identical. There is a positive obligation for the U.S. as a NAFTA trading partner to find the least trade-restrictive measure in the extraterritorial extension of its drug and alcohol regulations.

CPR submits that an absolute imposition of 49 CFR part 219 as contemplated would be contrary to NAFTA principles.

Regulatory differences are best resolved either bilaterally between Canada and the US, or through the Land Transportation Standards Subcommittee of NAFTA.

FRA has vastly underestimated the costs of the proposal

In the RIA statement, FRA underestimated the number of currently assigned Canadian crew members that would be subject to random testing. We also have spare board employees who may be called from time to time which were not included in the estimates, and employees have the right to bid on the pools twice each year. This means the number of employees potentially impacted each year is much higher than FRA included in its cost analysis. Furthermore, the

calculations do not address costs associated with litigation, labour investigations and arbitrations, and requirements for companies to accommodate employees who refuse to test up to the level of "undue hardship".

Let me give you some idea what the concepts of hardship and undue hardship mean. Suppose a conductor or locomotive engineer in a Canadian pool assigned to take trains into the U.S. refuses to submit to a test at his home terminal. In the U.S., the employee would be held out of service without pay. In Canada, because appellate level courts and policy statements by CHRC have found that random testing programs are discriminatory, we would be forced to compensate the employee, perhaps by moving him to a different pool and making up the difference in wages, or, if he is not needed in a different pool, to pay him to stay home. This would be considered "hardship" by the CHRC, but we would be forced to accommodate and pay the employee. Take that scenario further – lets say a few employees in a pool refuse to submit to testing. This is deemed "hardship" as well and we would have to accommodate the few employees. Now lets say all the employees in the pool have refused to test and cross border commerce at that location is severely impacted. At some point, we could likely argue that all of these costs have gone too far, that the impact on the business is too great -- to the point of "undue hardship" -- and we would no longer have to accommodate. This whole process would be incredibly disruptive to cross border trade and would take many years to settle.

What are the costs and benefits of this NPRM? Keep in mind that FRA has underestimated the number of affected employees and has completely excluded some significant costs associated with the Human Rights Legislation. Even if the significantly underestimated FRA COSTS with

a 20 year present value of $250,000.00 are used, we estimate the 20 year BENEFITS are a mere $6,700.00.

Conclusions

Nothing has changed since 1994 when FRA decided to withdraw the ANPRM on this subject. The factors present in 1994, namely, limited distance, limited operations, limited risk and regulatory equivalency continue to exist today.

Changes in Canadian regulatory requirements and railway policies, including Medical Rules, Safety Management System Regulations and more comprehensive railway Drug and Alcohol policies, have improved on the positive situation noted by FRA in 1994.

Under the Omnibus Transportation Act, we believe FRA is required to consider applicable laws and regulations of foreign countries and to establish only those requirements that are consistent with the international obligations of the U.S.

When the divergent approaches taken by various modes within US DOT are compared, and considering the de minimis nature of Canadian rail employees operating in the U.S., we believe FRA should consider an approach more in line with that taken by aeronautics.

There are significant practical and legal barriers in Canadian laws and regulations, which would place CPR squarely between compliance with Canadian law and FRA regulations. This could have a direct impact on international trade as Canadian crews could conceivably be prevented from operating in the United States.

If Canadian crews were prevented from entering the U.S., border trade would be disrupted. It is not feasible to exchange all traffic on the Canadian side of the border due to existing capacity and infrastructure constraints. This would have direct adverse cost consequences for U.S. and Canadian rail based shippers and U.S. carriers.

U.S. obligations under certain international trade agreements may be at odds with FRA's proposals to extend 49 CFR part 219 testing requirements to Canadian railway employees.

CPR submits that the current exemptions for FBFR employees should be continued. We base this on the limited distance, limited operations, limited risks, regulatory equivalency, modal comparisons, conflicts with Canadian law and International law implications.

If there is a bona fide and compelling reason supported by valid risk assessments to extend 49 CFR part 219 to FBFR employees, it should be negotiated directly by the Governments of the United States and Canada rather than between FRA and Canadian railroads in a rulemaking process.

Given the limited distances involved in the interchange of rail traffic in both our countries, CPR urges both FRA and Transport Canada to consider the notion of a "border zone" and to negotiate the rules and regulations that would apply with a goal of eliminating unnecessary regulatory impediments. Precedent for this already exists within two Canadian regulations that alter requirements for U.S. crews coming into Canada.